

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No: **ICC-01/14-01/18**

Date: **9 February 2022**

**TRIAL CHAMBER V**

**Before:**

**Judge Bertrand Schmitt, Presiding Judge  
Judge Péter Kovács  
Judge Chang-ho Chung**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF**

***THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD  
NGAISSONA***

**Public**

**Public Redacted Version of “Ngaïssona Defence Consolidated Response to ‘Confidential redacted version of ‘Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0888’ (ICC-01/14-01/18-1241-Conf-Red) and ‘Confidential redacted version of ‘Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1416’ (ICC-01/14-01/18-1244-Conf-Red)’”, ICC-01/14-01/18-1254-Conf, 19 January 2022**

**Source: Defence of Patrice-Edouard Ngaïssona**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court*****to:****The Office of the Prosecutor**

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## I. Introduction

1. The Ngaissona Defence (“the Defence”) hereby responds to the Prosecution’s ‘Confidential redacted version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0888”, ICC-01/14-01/18-1241-Conf-Exp, 11 January 2022’ (“the P-0888 Request”)<sup>1</sup> and ‘Confidential redacted version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1416”’ (“the P-1416 Request”).<sup>2</sup>
2. The Defence opposes the P-0888 Request, as the Prosecution has not demonstrated a change in circumstances that would warrant reconsideration of Trial Chamber V’s (“the Chamber”) assessment of P-0888’s security situation in its “Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses” (“the Original Decision”).<sup>3</sup> With respect to the P-1416 Request, the Defence defers to the Yekatom Defence’s position.

## II. Procedural history

3. On 7 December 2020, the Prosecution filed *ex parte* a request for in-court protectives measures for 72 trial witnesses, a confidential redacted version of which was made available to the Defence on 18 December 2020 (“First Request”).<sup>4</sup>
4. On 9 March 2021, the Chamber issued the Original Decision, where it rejected the Prosecution’s request to grant protective measures to, *inter alia*, witnesses

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<sup>1</sup> ICC-01/14-01/18-1241-Conf-Red

<sup>2</sup> ICC-01/14-01/18-1244-Conf-Red

<sup>3</sup> ICC-01/14-01/18-906-Conf-Red

<sup>4</sup> ICC-01/14-01/18-757-Conf-Red

P-1416 and P-0888, on the grounds that no objectively justifiable risk to the witnesses had been established by the Prosecution.<sup>5</sup>

5. On 11 January 2022, the Prosecution filed *ex parte* the P-0888 Request, a confidential redacted version of which was made available to the Defence on 12 January.<sup>6</sup>
6. On 12 January 2022, the Prosecution filed *ex parte* the P-1416 Request, a confidential redacted version of which was made available to the Defence on the same day.<sup>7</sup>

### III. Applicable Law

7. Article 67(1) of the Statute provides that accused persons have the fundamental right to a public hearing. This principle of publicity is further emphasised in Regulation 20 of the Regulations of the Court (“RoC”), which provides that “[a]ll hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber”.
8. The legal framework of the Court provides for exceptions to this rule in Article 68(1) and (2) of the Statute which is to be read together with Article 64 (2) and (6)(e) of the Statute as well as Rule 87 of the Rules. Article 68(1) permits the Trial Chamber to grant protective measures “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. However, it also provides that the protective measures put in place by the Trial Chamber “shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial”. According to the jurisprudence of the

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<sup>5</sup> ICC-01/14-01/18-906-Conf-Red, paras 41, 101

<sup>6</sup> ICC-01/14-01/18-1241-Conf-Red

<sup>7</sup> ICC-01/14-01/18-1244-Conf-Red

Court, the protective measures which the Prosecution seeks in the Requests, “should be granted only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused”.<sup>8</sup>

9. While the Court’s jurisprudence recognizes the power of a Chamber to reconsider its own decisions, reconsideration is exceptional and should be granted only in the event that there was a clear error of reasoning, or if it is necessary to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.<sup>9</sup>

#### **IV. Confidentiality**

10. Pursuant to Regulation 23*bis* of the RoC, the present submissions are filed as “confidential”, as they contain information on Prosecution witnesses that are not known to the public. The Defence will file a public redacted version of these submissions in due course.

#### **V. Submissions**

##### **a) P-0888**

11. The Defence opposes the P-0888 Request and respectfully disagrees with the Prosecution’s submissions that there has been a “marked change in circumstances” warranting a departure from the Chamber’s previous

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<sup>8</sup> The Prosecutor v. William Ruto and Joshua Arap Sang (Public redacted version of Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses') ICC-01/09-01/11-902-Red2 (3 September 2013) para 13. See also the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Public redacted version of 'Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence) ICC-01/04-01/07-1667-Red-tENG (9 December 2009) paras 8-9.

<sup>9</sup> ICC-01/14-01/18-206, para 20; The Prosecutor v. Dominic Ongwen (Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance) ICC-02/04-01/15-468 (15 June 2016), para 4; Prosecutor v. Ruto and Sang (Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits) ICC-01/09-01/11-1813 (10 February 2015) para 19.

assessment of P-0888's security situation.

12. *First*, the “fragile and volatile” situation in CAR was already brought to the Chamber's attention through the Prosecution's First Request.<sup>10</sup> Namely, the Prosecution argued that one of the factors warranting the granting of protective measures to several witnesses, including P-0888, was that 80% of the CAR territory was subject to the control of rebel groups, including the Anti-Balaka, who held a large influence in Bangui and in the provinces. While it is debatable whether the situation in CAR has in fact worsened since the Prosecution's First Request, the Defence submits that these alleged circumstances, by themselves, do not constitute a sufficient change in circumstances to justify the granting of protective measures, absent any evidence pointing to the existence of an objectively justifiable risk faced by witness P-0888 specifically.

13. *Second*, the Chamber is already aware, having taken it into account at the time of its decision not to provide P-0888 with protective measures, that: [REDACTED].<sup>11</sup> Indeed, in its Original Decision, the Chamber took similar factors into account for a number of [REDACTED] witnesses and found them to be by themselves insufficient to warrant the granting of protective measures, unless combined with other relevant factors.<sup>12</sup> Notably, the Chamber considered that a determining factor warranting the granting of protective measures was whether a witness had experienced security incidents that appeared to relate to their cooperation with the Court.<sup>13</sup> In this regard and as acknowledged by the Prosecution, witness P-0888 has not faced any security incidents to date that would, coupled with the above-mentioned factors, demonstrate a change in circumstances and the existence on an objectively

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<sup>10</sup> ICC-01/14-01/18-757-Conf-Red, paras 4, 9-13

<sup>11</sup> ICC-01/14-01/18-757-Conf-Anx-Red

<sup>12</sup> ICC-01/14-01/18-906-Conf-Red, para 31

<sup>13</sup> ICC-01/14-01/18-906-Conf-Red, para 48

justifiable risk to the witness' security.<sup>14</sup>

14. *Third*, the Prosecution speculates that the content of P-0888 testimony will expose him to a risk of retaliation. Notably, the Prosecution submits that [REDACTED].<sup>15</sup> Further, the Prosecution submits that [REDACTED].<sup>16</sup> The Defence respectfully disagrees with the Prosecution's assessment that the witness will face a risk of retaliation solely because of his role as a Prosecution witness. When interviewed by Prosecution investigators [REDACTED], P-0888 stated that: [REDACTED];<sup>17</sup> (ii) [REDACTED];<sup>18</sup> [REDACTED];<sup>19</sup> and [REDACTED].<sup>20</sup> Should the witness confirm this during his public testimony, the Defence cannot see how similar affirmations could expose him to retaliation at the hands of Mr Ngaïssona's family or "associates". Indeed, the Prosecution's submissions that [REDACTED]<sup>21</sup> is speculative and ill-rooted in the facts.

15. For the above reasons, the Defence respectfully requests the Chamber to reject the P-0888 Request, as there has been no change in circumstances justifying reconsideration of the Original Decision. Granting the P-0888 Request in the absence of an objectively justifiable risk would constitute a violation of Mr Ngaïssona's right to a public trial. The Defence submits that public anonymity makes it less likely that lies are uncovered by the process of public scrutiny through which persons may come forward to controvert evidence that has come to their attention through a public trial. Further, anonymity may affect the ability of the Chamber to fulfil its truth-seeking mandate, as making a

<sup>14</sup> ICC-01/14-01/18-1241-Conf-Red, para 12

<sup>15</sup> ICC-01/14-01/18-1241-Conf-Red, para 12

<sup>16</sup> ICC-01/14-01/18-1241-Conf-Red, para 14

<sup>17</sup> CAR-OTP-2031-0217-R03, at 0224, para 42

<sup>18</sup> CAR-OTP-2031-0217-R03, at 0224, para 44

<sup>19</sup> CAR-OTP-2031-0217-R03, at 0224, para 48

<sup>20</sup> CAR-OTP-2031-0217-R03, at 0226, para 59

<sup>21</sup> ICC-01/14-01/18-1241-Conf-Red, para 9

witness' identity known to the public increases the witness' commitment to tell the truth as well as their feeling of public accountability.<sup>22</sup> Should the P-0888 Request be granted, Mr Ngaïssona will be denied these fundamental guarantees.

16. *Lastly*, while acknowledging that the Chamber had qualified the rulings on protective measures in the Original Decision as *advance rulings*, the Defence notes that the Chamber stated that reconsideration may be warranted *in particular in light of further information provided by the Victims and Witnesses Unit (the 'VWU')*.<sup>23</sup> In this regard, the Defence notes with concern that the Prosecution appears to have taken it upon itself to raise requests for reconsideration based on security assessments which the VWU is better placed to conduct. Indeed, requests for additional protective measures have been raised by VWU in the past, without underlying Prosecution requests in that sense.<sup>24</sup> The Defence submits that, as it is established practice before this Chamber, it should be up to the VWU, if it considers it necessary, to bring new security concerns to the attention of the Chamber.

#### **b) P-1416**

17. The Prosecution requests reconsideration of the Original Decision, insofar as it rejects the granting of protective measures to witness P-1416.<sup>25</sup> As [REDACTED],<sup>26</sup> the Defence defers to Mr Yekatom's Defence team's position on the P-1416 Request. Nonetheless, the Defence notes that the risks advanced by the Prosecution in the P-1416 Request are speculative in nature.

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<sup>22</sup> United Nations Office on Drugs and Crime, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, 2008, page 45.

<sup>23</sup> ICC-01/14-01/18-906-Conf-Red, para 1

<sup>24</sup> See, *inter alia*: VWU email to the Chamber, the Parties and Participants of 10 May 2021, at 10:53, concerning witness P-2926; VWU email to the Chamber, the Parties and Participants of 28 May 2021, at 15:40, concerning witness P-2027

<sup>25</sup> ICC-01/14-01/18-1244-Conf-Red

<sup>26</sup> ICC-01/14-01/18-1244-Conf-Red, para 13



## VI. Relief Sought

The Defence respectfully requests the Chamber to **REJECT** the Prosecution's P-0888 Request.

Respectfully submitted,



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Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 9 February 2022

At The Hague, the Netherlands.